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UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

THE KING'S ENGLISH, INC., et al., Plaintiffs vs. MARK SHURTLEFF, In his official capacity as ATTORNEY GENERAL OF THE STATE OF UTAH, et al., Defendants.	MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS Case No. 2:05CV00485 Judge Dee Benson

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INTRODUCTION

Plaintiffs have filed a facial challenge to HB 260, Amendments Related to Pornographic and Harmful Materials, passed by the Utah State Legislature at the 2005 General Session. Plaintiffs charge that the Act is substantially overbroad and therefore a violation of the First and Fourteenth Amendments to the United States Constitution. Because the Act has delayed implementation dates, it is not currently being enforced. However, for 11 of the 14 plaintiffs, if the Act were being enforced there would be no "credible threat" of prosecution under the Act. Therefore these 11 plaintiffs should be dismissed for a lack of standing.

ISSUES PRESENTED

The following issues related to standing are presented in this Memorandum:

1. Whether plaintiffs who are not either Internet service providers (ISPs) or Utah-based Internet content providers have standing to maintain a facial challenge to HB 260.

2. Whether plaintiffs who merely "fear" – not prosecution – but that their website might be blocked to a specific user, who requested their ISP block certain websites, have standing.

3. Whether plaintiffs who are Utah-based Internet content providers, but who are "not likely" to ever be prosecuted under the Act, have standing to maintain this action.

SUMMARY OF THE ACT

In 2003 the United States Supreme Court upheld the Children's Internet Protection Act (CIPA) which required public libraries to use Internet filters as a condition for receipt of federal

subsidies. United States v. American Library Assn., Inc., 539 U.S. 194. In 2004 the United States Supreme Court extolled the virtues of Internet filtering by citing the COPA[1] Commission's Report to Congress finding "server-based" filters to be the most effective means of restricting minors' ability to gain access to harmful material on the Internet. Ashcroft v. ACLU, 124 S.Ct. 2783, 2792.

House Bill 260 (attached) is an attempt by the Utah State Legislature to follow the guidance of the Supreme Court in the above two cited cases. The underlying principle of the statute is that, ". . . the Government has an interest in protecting children from potentially harmful materials." Ginsberg v. New York, 390 U.S. 629, 639 (1968); Reno v. American Civil Liberties Union, 521 U.S. 844, 874 (1997).

The three primary provisions of HB 260 are as follows:

1. Internet service providers (ISPs) doing business in Utah are required to make filtering systems available to Utah consumers, either by employing a server-based filter system or making a user-based filter system available. The Act does not require that the filtering system be activated – only that it be available. If and when it is to be activated is at the consumer's discretion. (Utah Code Ann. § 76-10-1231.)

2. The Act requires the creation of a registry to be maintained by the State of adult content websites, which the consumer, if he or she so chooses, could request their ISP to block.

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[1]Child Online Protection Act (COPA).

The blocking of any website by an ISP is, again, only done at the consumer's request. (Utah Code Ann. §§ 67-5-19, 76-10-1232.)

3. The Act requires the state of Utah to promulgate regulations dealing with labeling, and provides that Utah-based website content providers are to label their website if it contains material which may be harmful to minors in conformance with the regulations. (Utah Code Ann. § 76-10-1233.)

Thus, failure to comply with the Act imposes criminal penalties only upon Internet service providers doing business in Utah, and Utah-based Internet content providers posting material which may be harmful to minors.

In determining the standard to be applied for filtering and blocking, the statute incorporates the ubiquitous "harmful to minors" standard (Utah Code Ann. § 76-10-1201(4)). The Utah statute was modeled after a New York statute upheld against a First Amendment challenge by the Supreme Court in Ginsberg, 390 U.S. 629, and has been upheld against a constitutional challenge by the Utah Supreme Court in State v. Burke, 675 P.2d 1198 (1984).

In their Complaint, Plaintiffs repeatedly note that nine states, as well as Congress, have passed laws attempting to deal with the issue of pornography on the Internet and that all statutes

have been declared unconstitutional or enjoined.[2] That is true. But then plaintiffs say that those statutes are "similar" to the Utah Act. That is not true. While all the other state statutes have their differences, in general, they have imposed criminal penalties on commercial Website content providers who post material on the Internet that is "harmful to minors," but provide an affirmative defense to those who restrict access to the web site by requiring the use of a credit card or an age verification system.[3] The courts have been uniform in declaring such restrictions an unacceptable burden to adult communications. The U. S. Supreme Court declared such restrictions an unacceptable burden to adult communications because a less restrictive means was available to restrict minors' access to Internet websites, i.e, filtering software. Ashcroft, 124 S.Ct. at 2792.

The Utah statute requires an ISP to either use a "generally accepted and commercially reasonable method of filtering" (Utah Code Ann. §§ 76-10-1231(1)(b) and 1232(1)(b)), or provide "software for contemporaneous installation on the consumer's computer that blocks, in

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[2]Southeast Booksellers Association v. McMaster, 371 F. Supp. 2d 773 (D.S.C., 2005); Center for Democracy & Technology v. Pappert, 337 F. Supp. 2d 606 (E.D.Pa. 2004); PSINet, Inc. v. Chapman, 362 F.3d 227 (4th Cir. 2004) ACLU v. Goddard, Civ. 00-0505 TUC-AM (D. Ariz. Aug. 11, 2004) American Booksellers Foundation v. Dean, 342 F.3d 96 (2d Cir. 2003); State v. Weidner, 611 N.W. 2d 684 (Wisc. 2004); ACLU v. Johnson, 194 F.3d 1149 (10th Cir. 1999) (New Cyberspace Communications, Inc. v. Engler, 55 F. Supp. 2d 737 (E.D. Mich. 1999) American Library Association v. Pataki, 969 F. Supp. 160 (S.D.N.Y. 1997).

[3]Except for the Pennsylvania statute, which required ISPs to block access to web sites state-wide displaying child pornography. While the Pennsylvania act was the first attempt by a state to impose liability on an ISP, it is still fundamentally different than the Utah Act. See Center for Democracy & Technology v. Pappert, 337 F. Supp. 2d 606 (2004).

an easy-to-enable and commercially reasonable manner, receipt of material harmful to minors." (Utah Code Ann. § 76-10-1231(3)(a)(ii)). In either case, activation of the filtering system is at the consumer's discretion. The Utah statute requires no credit card use or age verification system. The age verification system is an option, but it is not required.

Therefore, under the Utah Act, the user who chooses to access pornography or material harmful to minors is free to do so without any restrictions whatsoever. The Internet is free, open and available to any user under the Act. If the user requests a filtering system or blocking mechanism activated by his or her ISP, then, and only then, does access to certain websites become restricted. Rather than restrict access to all suspect websites, making the user jump through a series of hoops to gain access – as the other states and Congress have done – the Utah Act enables the user to restrict access to the internet, if he or she so requests and then even that request is subject to change at the user's discretion.

As a practical matter, filtering systems are presently used by most national Internet service providers and are structured so that family members can have different levels of filtering based upon whatever criteria the parents determine. For example, the parents use of the Internet can be totally unrestricted, whereas one filtering screen is available for a pre-teen, and another filtering screen available for a teenager. Most national Internet service providers currently provide such a filtering system.[4]

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[4]Note that AOL, MSN, Earthlink, Comcast, etc. are not plaintiffs in this lawsuit.

The Act has delayed implementation dates: (1) Filtering requirements for ISPs become effective January 1, 2006, (2) Blocking and labeling requirements are not effective until May 1, 2006. (§ 11.)

SUMMARY OF PLAINTIFFS' STATUS

Based upon the facts alleged in Plaintiffs' Complaint, the 14 plaintiffs fall into four categories:

1. Out-of-state content providers.

2. Utah-based content providers who claim not to have any material harmful to minors on their web site, but are "fearful" that the blocking of one website may block their website.

3. Utah-based content providers who claim to sell material which may be classified as harmful to minors.

4. Internet service providers.

SUMMARY OF ARGUMENT

Article III of the Constitution requires a plaintiff to present an actual "case or controversy." U.S. CONST. art. III §2. Among other things, the Constitution's case or controversy requirement requires a plaintiff to show that he or she has standing to bring suit. The "gist of the question of standing" is that plaintiff must allege a "personal stake in the outcome of the controversy." Flast v. Cohen, 392 U.S. 83, 99 (1968) (quoting Baker v. Carr, 369 U. S. 186,

204 (1962)); see also Schaffer v. Clinton, 240 F.3d 878, 882 (10th Cir. 2001). None of the 11 plaintiffs identified herein have a "personal stake in the outcome of the controversy" and therefore should be dismissed from the case for a lack of standing.

ARGUMENT

I. REQUIREMENTS FOR STANDING COMPEL THE DISMISSAL OF CERTAIN PLAINTIFFS.

"Standing is a threshold requirement, determined with reference to both constitutional limitations on federal court jurisdiction in Article III and prudential limitations on the exercise of that jurisdiction." Baca v. King, 92 F.3d 1031, 1035 (10th Cir. 1996) (citing Warth v. Seldin, 422 U.S. 490, 498 (1975)). To meet this requirement, the Supreme Court has said that a plaintiff must demonstrate, at an "irreducible constitutional minimum," that: (1) he or she has suffered an injury-in-fact; (2) there is a causal connection between the injury and the conduct complained of; and (3) it is likely that the injury will be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992); Ward v. Utah, 321 F.3d 1263, 1266 (10th Cir. 2003). These three elements of standing are "an indispensable part of plaintiffs' case," and thus, the plaintiff must support each element "with a manner and degree of evidence required at the successive stages of the litigation." Lujan, 504 U.S. at 561.

The first prong of the Lujan standing test requires that the plaintiff demonstrate that he has suffered an injury-in-fact through "a factual showing of perceptible harm," Lujan, 504 U.S. at 566; Bear Lodge Multiple Use Ass'n v. Babbitt, 175 F.3d 814, 821 (10th Cir. 1999), that must

be concrete rather than hypothetical. Horstkoetter v. Department of Public Safety, 159 F.3d 1265, 1278 (10th Cir. 1998); see also Bennett v. Spear, 520 U.S. 154 (1997); Byers v. City of Albuquerque, 150 F.3d 1271 (10th Cir. 1998). "Injury-in-fact must be concrete and imminent. Hypothetical or conjectural harm is not sufficient. When a law does not apply to a party, that party has suffered no invasion of a legally protected interest and may not question the law's constitutionality." Essence Inc. v. City of Federal Heights, 285 F.3d 1272, 1281 (10th Cir. 2002) (citing Warth v. Seldin, 422 U.S. 490, 504 (1975)).

Even where First Amendment rights justify a relaxation of the prudential limitations on standing to permit a facial challenge to a statute, a plaintiff "must nonetheless establish an injury-in-fact sufficient to satisfy Article III's case-or-controversy requirement." Ward, 321 F.3d at 1267. "Allegations of a subjective 'chill' . . . are not an adequate substitute for a claim of specific present objective harm or a threat of a specific future harm." Laird v. Tatum, 408 U.S. 1, 13-14 (1972).

A. Plaintiffs Who Claim to be Neither ISPs nor Utah-Based Content Providers.

Based upon the information contained in Plaintiff's Complaint, the following plaintiffs are neither ISPs nor Utah-based content providers – the only two categories of persons subject to criminal prosecution under the Act – and therefore should be dismissed:

1. The Sexual Health Network, Inc.: This plaintiff claims to be a "small, Internet-based company incorporated in the state of Connecticut," that distributes material which may be harmful to minors. Cmplt. ¶¶ 26, 153 - 159. Inasmuch as this plaintiff claims to be neither an

ISP nor a Utah-based Internet content provider, it is not subject to the Act. Under no conceivable interpretation of the Act can an out-of-state content provider be prosecuted under this Act. Therefore this plaintiff should be dismissed for lack of standing..

2. Comic Book Legal Defense Fund: This plaintiff is a non-profit corporation with its principle place of business in Massachusetts, representing "over 1,000 comic book authors, artists, retailers, distributors, publishers, librarians located in Utah." Cmplt. ¶¶ 31, 167. Inasmuch as this plaintiff claims to neither be an ISP nor a Utah-based content provider, nor represent an ISP or Utah-based content provider, it is not subject to the Act. Therefore, this plaintiff should be dismissed for lack of standing.

3. Publishers Marketing Association: PMA is a non-profit trade association located in California, representing more than 4,200 publishers across the United States and Canada. It claims 30 of its members are located in Utah, but makes no claim that any of those 30 members are Utah-based content providers. Cmplt. ¶¶ 33,171 -173. This Plaintiff does not claim to be either an Internet service provider or to be a Utah-based content provider, nor does it claim that any of its Utah members are Utah-based content providers. Therefore, the strictures of this Act do not apply to this plaintiff or its members, and it should be dismissed as well.

4. Association of American Publishers, Inc.: This plaintiff is a national association of the United States book publishing industry. Its approximately 300 members include most of the major commercial book publishers in the Unites States. Its members publish hardcover and paperback books and "also produce computer software and electronic products and services."

This plaintiff is incorporated in New York and has its principle place of business in New York City and in the District of Columbia. Cmplt. ¶¶ 30, 165 - 166. This plaintiff does not claim to be an ISP nor to have any members who are Utah-based content providers. Therefore, neither the association nor its members, based upon the information provided in the Complaint, could be prosecuted under the Act. Therefore, this plaintiff should also be dismissed for lack of standing.

5. Freedom to Read Foundation: FTRF is a non-profit membership organization established by the American Library Association to promote and defend First Amendment Rights. It is incorporated in Illinois and has its principle place of in Chicago. FTRF claims that it "sues on its own behalf, on behalf of its members who use online computer communication systems, and on behalf of the patrons of its member libraries." Cmplt. ¶ 32. Nowhere in the Complaint, however, does FTRF claim that it has Utah members, nor are any websites listed in the Complaint. Cmplt. ¶¶ 168 - 170. Since it is not an ISP and makes no claim to have members who are Utah-based content providers, this plaintiff also lacks standing and should be dismissed.

B. Utah-based Content Providers Who Claim Not to Post Any Material Harmful to Minors, but "Fear" Their Website Will Be Blocked.

Based upon the information contained in the Complaint, the following plaintiffs are Utah-based content providers who do not post material on their website which would be considered harmful to minors, but "fear" that the blocking of one website by an ISP may block their website.

First, whether an innocent website will ever be blocked at this point is purely speculative and unknowable. In order to determine whether an innocent website would be blocked under the

Act requires knowing: (1) what websites will be listed on the adult content registry (which has not yet been compiled), (2) whether the ISP will block by an IP address (other means are technologically available), and, (3) whether any customers will request blocking of a site containing the same IP address as the innocent web site. Secondly, any blocking of websites by an ISP is done at the consumer's request. In the event an innocent website is blocked, it is only blocked as to the requesting customer – not to other Internet users. If and when such a situation arose, the customer – knowing that they cannot access a particular website – could simply solve the problem by requesting the ISP to unblock the innocent website. Thirdly, the blocking of an innocent web site does not block the owner of the innocent website from receiving or sending protected speech otherwise available on the Internet, it only blocks access to the innocent web site by the customer who requested the blockage.[5]

For someone to say that they "fear" that their website will be blocked by this Act does not grant them standing under any conceivable scenario. Anticipation, fervor of advocacy, speculation, or even fear is not enough by itself to establish standing. See Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 485-86 (1982). Therefore, the following plaintiffs should also be dismissed from the Complaint:

1. W. Andrew McCullough: Mr. McCullough is a Utah resident who maintains a

[5]The Act contains an informed choice provision, requiring the ISP at the time of the consumer's request for blockage, to notify the consumer that such blockage "may also result in blocking material that is not harmful to minors." Utah Code Ann. § 76-10-1232(1)(ii).

website for a prior political campaign in Utah. While the website is accessible, it has not been updated since his run for political office in 2004. He claims the website "contains no content that would be considered harmful to minors," but "fears that his website will be blocked as a result of actions by ISPs to comply with the Act." Cmplt. ¶¶ 23, 148. Mr. McCullough's "fear" that his site will be blocked is unrealistic. Were his site to be blocked to a specific user, it would have been because the user requested blockage of an offensive site, who, when he discovered that Mr. McCullough's website had been blocked could request the ISP to unblock it.

2. Utah Progressive Network: UPNet is a coalition of organizations and individuals in Utah, which operates a website. "This website contains no content that would be considered 'harmful to minors.' " Rather, UPNet "fears" that its website would be blocked as a result of actions by the ISPs to comply with the Act. Cmplt. ¶¶ 27, 160. UPNet's "fear" that their site will be blocked is also unrealistic. Were their site to be blocked to a specific user, it would have been because the user requested blockage of an offensive site, who, when he discovered that UPNet's website had been blocked, could request the ISP to unblock it.

II. CERTAIN PLAINTIFFS LACK STANDING BECAUSE IT IS "NOT LIKELY" THEY WOULD EVER BE PROSECUTED UNDER THE ACT.

Defendants acknowledge that certain of the plaintiffs herein own "brick and mortar" establishments which sell material which may be deemed harmful to minors (defendants assume that these plaintiffs do not sell such material to minors), and therefore feel a certain sense of foreboding if such material, which they have every right to sell, is displayed on their web site.

However, having viewed the websites of these plaintiffs, defendants are totally perplexed as to why these plaintiffs would even be concerned with a violation of the Act. Listing the title of a book which may contain material harmful to minors on a website does not constitute a breach of the harmful to minors standard. Even describing the book, such as the ones identified in ¶ 141 of the Complaint, does not automatically trigger sanctions of the harmful to minors standard. While a battle line has to be drawn somewhere, these plaintiffs are not even on the field of engagement, let alone close enough to see the "whites of their eyes."

Fortunately, or unfortunately as the case may be, the two defendants with prosecutorial jurisdiction over The King's English and Sam Weller's Bookstores (both of which are located in Salt Lake County) are quite familiar with these bookstores.[6] Being familiar with the bookstores and having viewed the websites, Defendants Shurtleff and Yocom (the Utah Attorney General and the Salt Lake County District Attorney) cannot imagine those business establishments posting material on their website which would run afoul of the subject Act and as a result are willing to submit the attached affidavit stating that these defendants are not only "not likely" to ever be prosecuted under the Act, they are extremely unlikely to ever be prosecuted.

In Faustin v. City and County of Denver, Colorado, 268 F.3d 942 (2001) the 10th Circuit denied standing to a plaintiff facially challenging a statute in light of the prosecutor's written determination that the plaintiff was not violating the subject ordinance and it was "not likely"

[6]As patrons, not as prosecutors.

she would ever be charged with violating it. Id. at 948. In that same vein, Defendants Shurtleff and Yocom signed the accompanying Affidavit for the following plaintiffs: The King's English, Sam Weller's Zion Book Store, American Booksellers Foundation for Free Expression (ABFFE), and the American Civil Liberties Union of Utah.

American Booksellers Foundation for Free Expression has been included in this category because it claims its members are not adult bookstores but that some of its members "have their own web pages." Cmplt. ¶ 161. Since ABFFE has not identified any of its Utah members, defendants assume its members to be similar in nature to The King's English and Sam Weller's bookstores. Given that assumption, Defendants Shurtleff and Yocom cannot conceive of prosecuting any such bookstore for postings on its Internet website under the Act.

Since plaintiff ACLU of Utah does not claim in its Complaint to represent Utah-based Internet content providers, it also has been placed in this category. It claims that it "sues on its own behalf, and on behalf of its members who use online computer communication systems." Cmplt. ¶ 29. There is nothing on the ACLU of Utah website which would cause defendants to believe there would ever be any reason to prosecute the ACLU under this Act (see Affidavit ¶¶ 8 - 9) and users of online computer communications systems are not subject to prosecution under the Act. The only users who will be affected by the Act are users who request an ISP to either activate a filter system or block certain websites.

In short, there is "no credible threat" that these plaintiffs and the members they represent

will ever be subject to prosecution under this Act. Therefore, they should be dismissed for lack of standing.

III. PLAINTIFFS WHO HAVE STANDING

As a result of the above, there are only three plaintiffs for whom there is a "credible threat" of prosecution:

1. Computer Solutions International, Inc., and Mountain Wireless Utah, LLC: As Internet service providers, there is no question these two plaintiffs will be subject to the provisions of the Act regarding filtering and blocking by ISPs.

2. Nathan Florence: Mr. Florence's current website contains one painting which may be considered harmful to minors (full frontal nudity). Based upon paintings depicting full frontal nudity, Mr. Florence may be subject to the labeling requirements of the Act as a Utah-based content provider.

CONCLUSION

For the above stated reasons, the following plaintiffs should be dismissed from this cause of action for a lack of standing: The King's English, Inc.; Sam Weller's Zion Bookstore; W. Andrew McCullough; The Sexual Health Network, Inc.; Utah Progressive Network Education Fund, Inc.; American Booksellers Foundation for Free Expression; American Civil Liberties

Union of Utah; Association of American Publishers, Inc.; Comic Book Legal Defense Fund; Freedom to Read Foundation; and Publishers Marketing Association.

DATED this ____ day of August, 2005

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS was served by mailing the same, first class postage prepaid, to the following:

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